DOCUMENT RESUME

ED 301 898 CS 506 484

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TITLE Finding a Path Out of a Rhetorical Thicket: Developing a Situational and Qualitative Matrix to Assess FCC Arguments about Licensee Character Qualifications.
PUB DATE Nov 88
NOTE 31p.; Paper presented at the Annual Meeting of the Speech Communication Association (74th, New Orleans, LA, November 3-6, 1988).
PUB TYPE Speeches/Conference Papers (150) -- Reports - Research/Technical (143)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS Broadcast Industry; Communication Research; Discourse Analysis; Language Role; *Models; *Persuasive Discourse; Rhetorical Criticism
IDENTIFIERS *Epideictic Rhetoric; *Federal Communications Commission; Legal Language; Rhetorical Effectiveness; Rhetorical Strategies

ABSTRACT

A study developed an analytical tool for the critiquing of FCC legal arguments in the dimensions of purpose and quality. The supposition of the study was that law is an inherently rhetorical activity. The model elaborated was a situational matrix created out of the classical typologies of rhetorical occasions and oratory: the forensic, deliberative and epideictic. Usefulness of the matrix was demonstrated by the analysis of a problematic set of FCC cases: those concerning the character qualifications of broadcast licensees. The matrix should allow for the common elements of disparate legal discourse to be revealed more clearly so that better policies can be made within the FCC via its application, not only in relation to the question of the character qualifications of licensees, but in all commission legislative, executive and judicial functions aimed at promoting the general welfare through the powerful broadcast media. (Three figures are included, and 76 notes are attached.) (RAE)

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Finding a Path Out of a Rhetorical Thicket: Developing a Situational and Qualitative Matrix to Assess FCC Arguments About Licensee Character Qualifications

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Seventy-Fourth Annual Meeting
Speech Communication Association
New Orleans Marriott
New Orleans, LA
November 3-6, 1988

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FINDING A PATH OUT OF A RHETORICAL THICKET: DEVELOPING A SITUATIONAL AND QUALITATIVE MATRIX TO ASSESS FCC ARGUMENTS ABOUT LICENSEE CHARACTER QUALIFICATIONS

Abstract

This study develops an analytical tool for the critiquing of FCC legal arguments as per their purpose and quality. The model is a situational matrix created out of the classical typologies of rhetorical occasions and oratory: the forensic, deliberative and epideictic. Usefulness of the matrix is demonstrated by the analysis of a problematic set of FCC cases: those concerning the character qualifications of broadcast licensees.

FINDING A PATH OUT OF A RHETORICAL THICKET: DEVELOPING AND USING A SITUATIONAL AND QUALITATIVE MATRIX TO ASSESS FCC ARGUMENTS ABOUT LICENSEE CHARACTER QUALIFICATIONS

The supposition of this study is that law is an inherently rhetorical activity. As legal scholar James White states, law must:

> act through the materials it is given-- an inherited language, an established culture, an existing community--which in using it transforms.
>
> In this view law is in the first place a language, a set of terms and texts and understandings that give to certain speakers [i.e., competing lawyers and judges] a range of things to say to each other.1

This language of law possesses three elements, argues White: the persuasive (lawyers convincing administrative law judges); the creation of accepted discourse formations (successful legal arguments shape future legal arguments); and the shaping of a socially-constituted ethic (common values come to be reflected in a society's law)2. As he also suggests, in the American governmental enterprise the powers that be cannot just make law, they must in addition explain their reasoning for doing so.3 The purpose of this paper is to seek out the reasoning that the FCC has employed in their consideration of broadcast licensee "character" over the years, and to place this reasoning in the context of a functional political system. To aid in this task, a rhetorical interaction model will first be developed which will reveal the various purposes that the Commission

obtains with its legal arguments concerning licensee character qualifications, and then a schema with which to analyze the quality of FCC arguments given in support of recent changes in their policies concerning the defining, measuring and enforcing of character qualifications of broadcast licensees will be created. Character analyses of licensees is required, because, according to the 1934 Communications Act, they are to operate in "the public interest, convenience and necessity." 4 Finally, some descriptive definitional constructs and examples will be provided for each of the matrix's categories.5

Functions of a Regulatory Agency Operating in a Socio-political Environment

In his all-encompassing theory of rhetoric, Aristotle noted that there are three kinds of discourse: forensic, deliberative and epideictic.6 As Golden, et al,7 outline, the functions, time, means and ends of these speech typologies are:

Kind of Speech	Kind of Auditor	Time	Ends	Means
Forensic	Decision-maker	Past	The unjust and just	Accusation and defense
Deliberative	Decision-maker	Future	The advantageous and disadvantageous	Persuasion and dissuasion
Epideictic	Spectator	Present	The noble and the shameful	Praise and blame

It is argued in this study that the Federal

Communications Commission, being an independent regulatory governmental agency (ILR) endowed with "quasi" legislative, executive and judicial powers employs all three forms of argument detailed above in its regulations, policy statements and administrative rulings.8 In its deciding of license renewal petitions, for example, the Commission operates in a forensic mode. In such a hearing, the FCC is attempting to ascertain if the incumbent broadcaster has operated in the public interest over the past term of his or her license; it is also possibly weighing the merit of charges and counter-charges between competing applicants for the license, all the while balancing the demands of procedural and substantive due process for the individual licensee with those demands for good service by the "public," for which the licensee operates the station as a public trustee.9 But most importantly, the FCC must make a decision, and subsequently justify the reasonableness of that decision to communication lawyers everywhere in Washington.10

In its quasi-legislative role, the FCC acts as a deliberative assembly, attempting to craft radio regulations to fit the needs of an ever-changing and uncertain future.11 The ends of this process are to make rules that balance the requirements that the Commission has to fulfill so to carry out its Congressional mandate efficiently, and yet make it possible for privately held, profit-motivated broadcasters to function in a competitive environment.12 Persuasion and dissuasion (or, more bluntly, lobbying) of the Commission

goes on constantly in relation to this rule-making function, in that so many broadcasters have a great stake (usually financial) in what regulations are considered and/or passed, and how these rules are written.13

So far, most of this description seems reasonable and somewhat ordinary. But how can one logically suggest that FCC legal discourse performs an epideictic function as well? In the Aristotelian model of rhetoric, the epideictic audience is not composed of decision-makers but of spectators; the time-frame is not focused towards the future but placed squarely in the present; and the purpose of the discourse is to ferret out the shameful from the noble by the agency of praise and blame. Some people might have difficulty is seeing a federal agency in this role as a ceremonial rhetor, but it functions in it from necessity.14

In the case of the FCC, the epideictic audience are the "attentive publics" (people in the broadcast industry, people who study or employ a considerable amount of the regulated media, politicians who consider legislation that might affect the agency);15 the ends are those policy objectives that the politically-appointed Commissioners (and especially the Chairman) want enacted on ideological grounds, with the means to these pre-determined ends being policy statements and media interviews, e.g., immediate past Chairman Mark Fowler's praise of telecommunication deregulation and the control of the media by the free marketplace, as well as his blame of

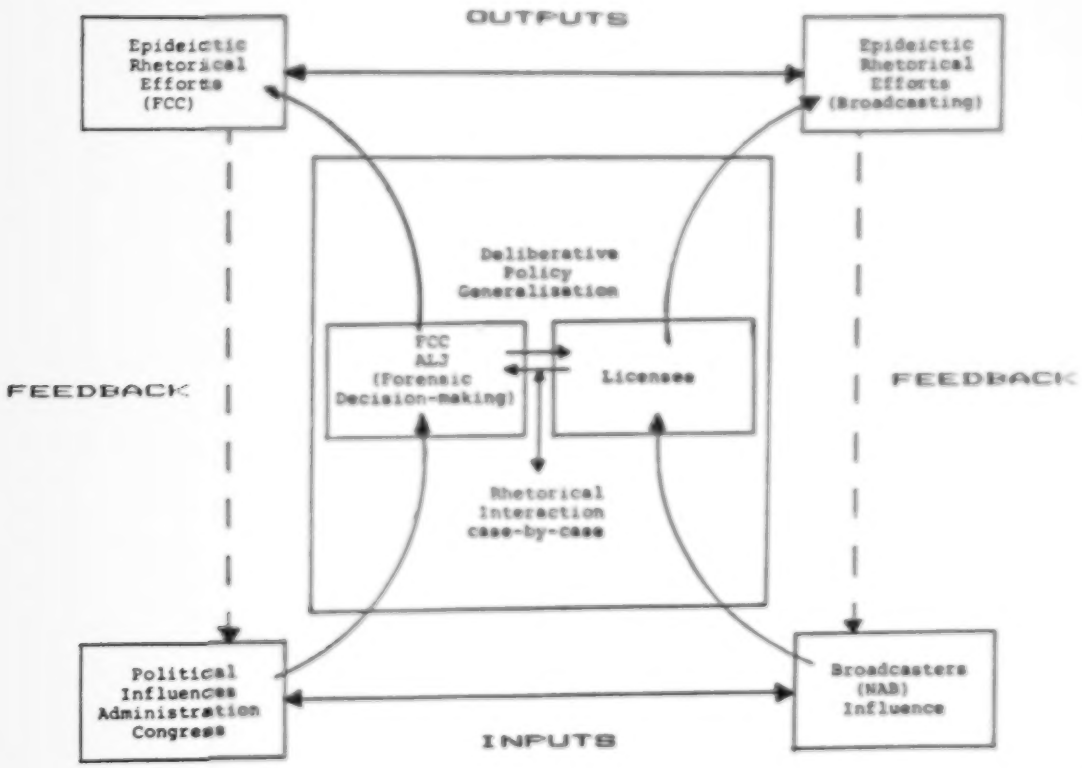
faceless agency bureaucrats who have "perverse incentives" that cause FCC policy shortfalls and failures. Fowler made this statement to the mouthpiece of radio and television licensees, Broadcasting magazine.16 By the use of such a rhetoric of praise and blame in the political arena, the ideological goals of the Commission are crafted and disseminated.

In discussing this ideological turn of Commission discourse, it is important to note that just because the FCC is called an "independent" regulatory agency does not mean that it is separate from the political sphere of influence: After all, a majority of the Commissioners are from the President's own party, with the Chairman being selected by the President from among the Commission's membership.17 As Bernard Schwartz 18 argues, the Supreme Court, in Buckley v. Valeo (1976), upheld the power of the President to appoint primary agency personnel. As he also notes, independent regulatory agencies can legally be composed of members of the respective "regulated" professions if the president so desires.19

While it is true that Congress passes the enabling legislation that both creates and limits the ILRs such as the FCC, confirms the President's personnel appointments to the agency, has the "power of the purse and exercises oversight authority over them,20 administrative law created in the federal agencies basically increases the power of the

executive branch of government.[21] As Chief Justice Vanderbilt asserted in 1954,[22] administrative law [aided more recently by the Administrative Procedure Act][23] has "'become the outstanding legal development of the twentieth century, reflecting in law the hegemony of the executive arm of the government.'"[24] Thus, it can be reasonably argued that the FCC is a politically-involved institution, and engages in ongoing ideologically-oriented epideictic rhetoric.

The interaction of these multi-functional political discourses within the social environment are noted below, in a model adapted from a speech situation diagram provided by John Makay:[25]



Applying a Rhetorical Measurement of Argumentative Quality to Legal Discourse

To effectively analyze the quality of legal discourse within federal agencies such as the FCC, one must not look only at the purpose of the argument as noted above, but also assess the quality of its internal logic and structure. According to Richard Weaver,[26] the logic of persuasive messages can be of three basic types: The argument can be based upon a warrant of genus or definition; or the appeal can be based upon the use of analogy; or an argument can be made employing the rationale of cause and effect.[27] To Weaver, the most sound arguments are made from genus or definition, because in either case the basis of the claim lies either in physical nature (genus) or in the accepted nature (definition) of the elements of the argument.[28] In the promulgation of law, for example, one often encounters argument from definition, wherein the meaning of the core legal terms employed in the brief(s) are carefully argued and then defined in as precise and exact way as possible, and then are deductively applied to the case in a unambiguous fashion.[29] It is via this form of reasoning that new legal concepts are created or the meaning of old legal strictures expanded.[30]

A good example of legal argument from definition is found in the creation and expansion of equal-rights

proscriptions in American law.[31] Firstly, proponents for civil rights expansion appealed to the core value of equality as expressed in foundational legal documents of the republic, and then pointed to the painful contradiction of discrimination.[32] Then, through seminal court decisions and legislative action, the meaning of certain phrases referring to "equality" in the Constitution were expanded.[33] The new and broadened definition of equal rights then became the legal procedent that provided argumentative grounds for subsequent legal discourse. Thus, the application of the newly re-defined legal concept or value to future legislative, executive or judicial proceeds in a analogical manner.

In arguing from the second ground, analogy or comparison, one is, according to Weaver, "reasoning from something we know to something we do not know in one step, hence there is no universal ground for predication."[34] This method of proof is not based upon as firm a ground as arguing via definition, but it is the best argumentative logic to use if the best knowledge one has of the subject is only probable and not certain.[35] In legal decision-making this logical methodology is seen when previous legal decisions that are considered to be similar to the case under review in important particulars are held to determine the ruling of the hearing at hand.[36]

In a somewhat different vein, reasoning by analogy is

also apparent when a inferential leap is made by a judge in connecting two similar, but separate behaviors of a party in a hearing. (e.g., when the FCC holds that a licensee that has not broken any laws [outside those enumerated in the Communication Act] is more likely to serve the public interest through broadcasting than one that has broken various federal regulations not directly disqualifying in themselves)[37] Even though legal reasoning via analogy is less exact than argument than by definition, there is the possibility of generating general operative principles from a series of comparative arguments, states Weaver.[38]

Claims based upon cause and effect logic, on the other hand, are based upon not a universal governing principle, but upon historical occurrences. "We all have to use it," however, admits Weaver, "because we are historical men."[39] This reasoning is, however, based upon an historical materialism vision of reality that takes philosophical prejudices of a culture as a given.[40] In the legal sphere, this reasoning views the desirability of regulations as measured upon their ready acceptance by the governed. In the history of radio regulation, for example, the very creation of the Federal Radio Commission in 1927 was the result of pressure from the broadcast industry itself due to the exigency of spectrum chaos which was rapidly making the medium unusable for all broadcasters.[41] This argument, though effective, was ironically not in itself based upon the governing principle of the resultant 1927 Radio Act, that of

licensees functioning as trustees serving the public interest.[42]

A sub-category of cause and effect reasoning that makes no attempt to ground itself in any governing idea is an appeal to circumstance. Weaver, in pointing out the dangers of relying on this form of argument, states:

> Circumstance is an allowable source [of claims] when we don't know anything else to plead.. . . Of all the arguments, it admits of the least perspicaciousness. An example of this which we hear nowadays with great regularity is: "We must adapt ourselves to a fast-changing world".. . . Such argument is preeminently lacking in understanding . . .. It simply cites a brute circumstance and says, "Step lively." Actually, this argument amounts to a surrender of reason.[43]

Much argument in the FCC these days seems to be based upon such circumstantial reasoning, as seen in its retreat from enforcing a strong public interest standard among broadcast licensees,[44] e.g., under the 1951 Uniform Policy Code,[45] a broadcast applicant's character qualifications were held to be strongly affected by its lawfulness [or lack of it] in other areas of federal law, particularly trade regulations, the importance of which is made clear in section 313 of the Communications Act.[46] However, in recent years, the Commission has gotten cold feet about prosecuting broadcast license holders that break federal trade regulations.[47] In an 1981 Notice of Inquiry policy statement on the character qualifications of licensees, the FCC made

these telling observations:

> [I]n analyzing applicant qualifications, the Commission often has found itself in the position of moral arbiter, judging whether the applicant before it possesses the requisite moral and ethical capacity to operate a broadcast station in the public interest.. . .
>
> [However] generally, we believe that our attention as regulatory agency should be focused on matters directly relevant to performance as a broadcaster in the public interest. We lack the expertise and the resources to interpret other statues and to make value judgments about behavior unrelated to the broadcast licensee function.48

Additional revealing comments from the the 1986 character policy statement include:

> While it has been held that that "an agency charged with promoting the 'public interest' in a particular substantive area may not simply 'ignore' the policies underlying other federal statutes," it has also been interpreted that "the use of the term 'public interest' in a regulatory statute is not a broad license to promote the general welfare.49
>
> [Thus] we do not believe that the level of review of non-FCC conduct called for by the [1951] Uniform Policy is justified.50
>
> 'Experience dictates change.'51
>
> Commission consideration under "character" criteria [should be limited to] only of matters clearly relevant to the licensing process, with that process made more equitable and efficient.52

In each of these examples of argument by circumstance, the FCC was invoking the cause of adapting the standard to the level of practice. The morality reflected here is the morality of the "marketplace."53 The obligations of a public

trustee as outlined in the Communications Act of 1934 have been operationally defined out of existance by the current FCC.[54]

Creation of a Purpose/Quality Matrix for Categorizing FCC Legal Arguments

One way of accurately appraising the appropriateness and reasonableness of such claims of the Commission is to combine the three Aristotelian rhetorical-purpose elements described previously (the forensic, deliberative and epideictic) with three of Weaver's qualitative measures for the quality of argumentative grounds. By the use of such a construct/matrix model it is possible to categorize and judge the arguments of the FCC within an socio-political environment.[55] In addition, the matrix has considerable heuristic possibilities in future applications in the study of bureaucratic, legal speech functions in other ILRs.[56] With its use, a researcher can find common threads amist a vast number of law cases and make rhetorical sense of them.

Construction of the matrix is simple. Along the "Y" axis, one places the three rhetorical forms of discourse (the forensic, deliberative and epideictic). Along the "X" axis, one places the various logical forms of argument (definition, analogy, circumstance). The result is nine distinct analytical categories. The model is diagrammed thusly:

	Definition	Analogy	Circumstance
Forensic	1	4	7
Deliberative	2	5	8
Epideictic	3	6	9

Descriptive Construct Definitions and Examples

By the use of this discursive matrix, one can analyze the all-important interaction between the social purpose of rhetoric and the epistemological basis for the arguments offered in the pursuit of policy goals. In the following section, various definitional construct statements will be created for each category in the matrix, along with some applicable FCC examples. The precision and utility of this methodology can then be judged by the practical insights it can offer students of governmental discourse.

1. Forensic/Definition: Judicial rhetorical reasoning in this vein will be based upon the core legal principles that are the outcome of argumentation before a reasonable and qualified "composite" audience, and then are clearly applied to the case at hand, often setting new legal precedents in the process.57 Sample cases: KFKB Broadcasting Association v. Federal Radio Commission, (1931)58 (all-inclusive general "character" standard applied to all programming output of KFKB); WSAL, (1940)59 (station license revoked for "false and fraudulent statements representations" made by the licensee to the Commission two years previously, despite a finding that the management of WSAL might not have intended to deceive the Commission 60); and Mayflower Broadcasting Corporation v. FCC, (1940)61 wherein the Commission, upon making a finding of misrepresentation by Mayflower, stated:

> Whenever an applicant, such as here, makes material misrepresentations in its application which at are variance with the true facts, a serious question is presented and problems arise which affect and, in fact, substantially impede, the progress of the Commission in carrying out its mandate . . .. Under no circumstances can the Commission excuse or condone action of this sort. A proposed licensee who acts in this manner cannot be entrusted with the burdens imposed by a broadcast license.62

Basically, in the assessing of character qualifications of broadcast licensees via this forensic/definitional method, the focus will be upon the basic qualifications of the applicants, and the resulting judgment will be strictly based upon the definition of "character" reasonably arrived at by the Commission, whether it be broad or narrow.63

2. Deliberative/Definition: Regulations are deduced from legal concepts that are the result of possible judicial ground-breaking made in hearings, which are then held to be super-ordinal constructs for the writing of new Commission policies and guidelines.64 The primary legal groundwork on character qualifications as set down in the above-noted pivotal cases was codified in the 1951 Uniform Policy Statement, for instance.65 Some citations from the Uniform Policy will make the genalogy of the document upon earlier legal concepts and precedent-setting judicial decisions clear:

> Under the Communications Act of 1934, as amended, licensees are required by law to operate radio stations in the public interest.. . . [T]he Commission may grant applications only if the public interest, convenience and necessity will be served. No intelligent appraisal of applicants in terms of this standard can be made without an examination of the basic character qualifications of the applicants . . . (emphasis in original).
>
> We believe a pertinent part of this [character of licensee] history would clearly include any violation of Federal law.. . . [T]he Commission's authority to consider violations of Federal laws, other than the Communications Act of 1934, [esp. anti-trust law violations] in evaluating applicants for radio facilities is well established and that a positive duty is imposed upon us to exercise this authority (emphasis added).66

3. Epideictic/Definition: In this frame, the Commission would be exhorting broadcasters and other interested parties, via its "political" speechmaking, to support its policies

which set clear standards of licensee behavior that are adjudged to be reasonably deduced from core legal concepts and are thereby believed to deserve adherence to by broadcast licensees.67

4. Forensic/Analogy: Commission cases in this mode are based upon similar cases that have been decided previously, and the precedent is followed in the decision at hand. This is the "everyday" administrative judicial process in action and no new legal ground is broken.68

5. Deliberative/Analogy: Commission regulations are created by a comparative process, wherein criteria for law-making are based primarily upon legal precedent established by previous cases held to be germane. In this mode of reasoning, the Commission does not break new legal ground, but simply follows the paths cut by previous decisions.69

6. Epideictic/Analogy: In this mode the Commission will basically follow a professional, administrative policy course and its rhetorical discourse will be focused upon gaining industry co-operation in fulfilling FCC legal responsibilities, as traditionally defined.70

7. Forensic/Circumstance: in this category, one can fit any case that was a expedient finding, that is, a ruling that departs from similar legal precedent without an appropriate

rationale being offerred for doing so.71

8. Deliberative/Circumstance: In this mode, Commission policies are drawn in considerations of the social "reality" of the broadcast industry. Any legal reasoning done for circumstantial purposes is thus selective and convoluted because adherence is sought from a "particular" audience and not a "universal" one.72 Thus, the arguments are aimed to sway the self-interested prejudicies and not the higher communal qualities of the auditors. Some examples of this mode of reasoning are: the current Commission's holding that "character" should not be a comparative-hearing issue (because it is difficult and costly for the FCC to assess character qualifications)73; as well as the decision of the Commission to not automatically consider the non-FCC related lawbreaking of broadcast licensees in its 1986 policy statement (a retreat from the policy articulated in the 1951 Uniform Policy 74). In sum, the composition of regulations are dictated by the currently-accepted practice of the licensees, who are not the most disinterested auditors one can imagine as far as broadcasting policy is concerned.

9. Epideictic/Circumstance: This rhetorical category would include the many public statements made by the current Commission that call for a the elimination of statutory requirements that the FCC currently believes is too bothersome to enforce.(e.g., the policy statement by the FCC

on the fairness doctrine.75) This reasoning by circumstance is particularly apparent when the agency argues that a regulation should be dispensed with because it is unpopular with the regulated industry, too inconvenient to enforce, or when the Commission suggests that it ought to surrender its regulatory responsiblities to market forces, because it is claimed that the "invisible hand" somehow governs broadcasting better than thinking and concerned experts, who are charged with specific oversight responsibilities in the Communication Act to promote the "public" and not the "private" interest in radio broadcasting.76

Conclusion

In this paper, a combinant rhetorical matrix has been developed that allows for the examination of FCC discourse (or that of any other independent regulatory agency) in two dimensions: its purpose and its argumentative quality. The matrix created by the interaction of the two classical models of rhetorical analysis allow for the common elements of a disparate legal discourse to be more clearly revealed. Thus, it is hoped that better policies can be made within the FCC via its application, not only in relation to the question of the character qualifications of licensees, but in all Commission legislative, executive and judicial functions aimed at promoting the general welfare through the powerful broadcast media.

NOTES

1 James Boyd White, Heracles Bow: Essays on the Rhetoric and Poetics of the Law (Madison: Univ. of Wiscousin Press, 1985), pp. x-xi.

2 White, pp. 33-35.

3 White, p. 239.

4 Section 302a, Communications Act of 1934, amended reprinted in Kahn, Documents in American Broadcasting 4th ed. (Englewood Cliffs: Prentice Hall, 1984) , pp. 417-86.

5 For a sample of this construct-creation technique, see Robert R. Monaghan et al, "Predicting Viewer Preference for New TV Program Concepts," Journal of Broadcasting 18:2 (Spring 1974): 131-41.

6 Lane Cooper, The Rhetoric Of Aristotle (New York: Appleton+-Century-Crofts, 1960), p. 17.

7 James L. Golden, Goodwin F. Berquist and William E. Coleman, The Rhetoric of Western Thought, 3rd ed. (Dubuque: Kendall Hunt, 1983), p. 61.

8 William A. McClenaghan, Magruder's American Government, 1982 ed. (Boston: Allyn and Bacon, 1982), pp. 416-7, 462-5.

9 See Erwin G. Krasnow and Lawrence D. Longley, The Politics of Broadcasting Regulation, 2nd ed. (New York: St. Martin's, 1978), pp. 15-19; and Syndey W. Head, Broadcasting in America, 3rd ed. (Boston: Houghton Miffin, 1976), pp. 322-4, 357-60.

10 Because, as Krasnow et al note, (pp. 39-40, 78) communications lawyers are central players in the policy interplay between the Commission and the broadcast industry.

11 As an example of this problem of regulations keeping up with technology, one can point out the problems that the FCC has had in regulating telephones and cable TV. See Elizabeth Mann, "Telephones, Sex and the First Amendment," UCLA Law Review 33 (1986): 1221-46; and Pamela Gullett, "The 1984 Cable Flip-Flop: from Capital Cities Cable Inc. v. Crisp to the Cable Communications Policy Act," The American University Law Review 34 (1985): 557-90.

12 Head, pp. 8-10; Krasnow et al, p. 38.

13 Head, pp. 412-14; Krasnow et al, pp. 41-43.

14 Golden et al, pp. 60-61.

15 See Krasnow et al, "Five Determiners of Regulatory Policy," in op. cit., pp. 27-68.

16 "Older, Wiser and Still Recalcitrant: On the Way Out With Mark Fowler," Broadcasting (April 6, 1987), pp. 46-48. For an overview of the role that Broadcasting magazine performs in industry politics, see Krasnow et al, pp. 57, 121.

17 McClenaghan, p. 566.

18 Bernard Schwartz, "The Heraculitean Nature of Administrative Law," New England Law Review 17 (1982):1131.

19 Schwartz, p. 1131.

20 M. Patricia Brickett, "The Issue of Finality in Federal Agency Action," New England Law Review 17 (1982):1240-1.

21 Schwartz, p. 1130.

22 Schwartz, p. 1130.

23 Administrative Procedure Act, Section 706 "Scope of Review," 5 USC 706.

24 Qtd. in Schwartz, p. 1130.

25 John J. Makay, Speaking With an Audience: Communicating Ideas and Attitudes, 3rd ed. (Dubuque: Kendall/Hunt, 1984), p. 8.

26 Golden et al, pp. 273-4.

27 Richard M. Weaver, "Language is Sermonic," reprinted in Golden et al, pp. 278-82.

28 Weaver, p. 278-82; White, pp. 34-35.

29 White, pp. 34-35.

30 White, p. 43.

31 Weaver quotes Abraham Lincoln's Oct. 16, 1854 speech against slavery as an argument from definition in A Rhetoric and Handbook, Rev. ed. (New York: Holt, Rinehart and Winston, 1967), p. 138.

32 See David M. Hunsaker, "The Rhetoric of Brown v. Board of Education: Paradigm for Contemporary Social

Protest," Southern Speech Communication Journal 43 (1978):91-109; and Martin Luther King's "I Have A Dream" speech, reprinted in Floyd W. Matson, ed. Voices of Crisis: Vital Speeches on Contemporary Issues (New York: Odyessey Press, 1967), pp. 156-61.

33 Brown v. Board of Education of Topeka 347 US 483, (1954); Civil Rights Act of 1964 78 Stat. 241.

34 Weaver, "Language is Sermonic," in Golden et al, p. 280.

35 Weaver, p. 280.

36 For a brief historical treatment of the concept of legal precedent in American law, see Lawrence M. Friedman, A History of American Law (New York: Simon and Schuster, 1973), pp. 17-18.

37 Report on Uniform Policy as to Violation By Applicants of Laws of the United States 42 FCC2d 399; Policy Statement on Comparative Broadcast Hearings 1 FCC2d 393 (1965); For a overview of problems related to comparative hearings, see Robert J. Brinkmann, "The Policy Paralysis in WESH: A Conflict Between Structure and Operations in the FCC Renewal Process," Federal Communications Law Review 32 (1980):55-56; Janet L. Hoffman, "The Struggle to Define

Character in FCC License Renewal Decisions: RKO General Inc.," Boston College Law Review 22 (1981):409-37;

39 Weaver, "Language is Sermonic," in Golden et al, p. 280.

40 Weaver, p. 281.

41 Kahn, p. 36.

42 The Radio Act of 1927, reprinted in Kahn, pp. 40-56; Louis G. Caldwell, "The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927," Air Law Review 1 (1930):297-300.

43 Weaver, "Language is Sermonic," in Golden et al, p. 281.

44 Report, Order and Policy Statement: Policy Regarding Character Qualifications in Broadcast Licensing 102 FCC2d 1179,1207.

45 Uniform Policy 42 FCC2d 399.

46 Communications Act of 1934, in Kahn, pp. 446-7.

47 See Andrew C. Gold, "The Recognition of Legitimate

Renewal Expectancies in Broadcast Licensing," Washington University Law Quarterly 58 (1980):413-23 on the changing tactics of the FCC to benefit incumbent licensees in comparative hearings despite Court challenges.

48 Notice of Inquiry: Policy Regarding Character Qualifications in Broadcast Licensing 87 FCC2d 836,840f.

49 Report, Order and Policy Statement: Character Qualifications 102 FCC2d 1179,1207.

50 ROPS, p. 1195.

51 ROPS, p. 1207.

52 ROPS, p. 1189.

53 Mark Fowler and Daniel L. Brenner, "A Marketplace Approach to Broadcast Regulation," Texas Law Review 60 (1982):207-47.

54 Report, Order and Policy Statement: Character Qualifications 102 FCC2d 1179,1207; For a background on trusts and their fuduciary responsibilities see William F. Fratcher, Scott on Trusts, 4th ed. (Boston: Little and Brown, 1987), pp. 38-48.

55 Monaghan et al, pp. 131-41.

56 Peter Du Perez, "The Application of Kelly's Personal Construct Theory to the Analysis of Political Debates," Journal of Social Psychology 95 (1975):267-70.

57 Josina M. Makau, "The Supreme Court and Reasonableness," Quarterly Journal of Speech 70 (1984): 391.

58 KFKB Broadcasting Association v. Federal Radio Commission 47F.2d 670, reprinted in Kahn, pp. 76-9.

59 Revocation of Station License of Station WSAL 0 FCC 34.

60 Brian C. Murchison, "Misrepresentation and the FCC," Federal Communication Law Journal 37 (1985):400-9.

61 The Mayflower Broadcasting Corporation; the Yankee Network Inc. 0 FCC 333.

62 Mayflower, p. 338.

63 See Mid Ohio Communications Inc. 104 FCC2d 573,599f, for a strict application of the new character qualification criteria.

64 Mid-Ohio, Freidman, p. 17.

65 Uniform Policy 42 FCC2d 399.

66 Uniform Policy., p. 400-1.

67 For a statement of such a "rhetoric of assent" see Wayne Booth, Modern Dogma and the Rhetoric of Assent (Chicago: Univ. of Chicago Press, 1974).

68 Christine Gasser points out the problems associated with the "analogizing" approach of law vis a vis new communication technologies in "Cable Television: A New Challenge for the 'Old' First Amendment," St. John's Law Review 60 (1985):120.

69 Gasser, p. 120.

70 Krasnow et al, p. 187.

71 See Murchison's comment on the FCC's decision in the Navarro Broadcasting Association case of 1940 (8 FCC 198) which was, according to him "'impossible to reconcile'" with the decision about the others (WSAL and Mayflower) "and the Commission did not even try," p. 409.

72 The idea is Chiam Perelman's, see "The New Rhetoric:

A Theory of Practical Reasoning," in Golden et al, pp. 410-15.

73 Report, Order and Policy Statement: Character Qualifications, p. 1183.

74 ROPS, p. 1195.

75 "General Fairness Doctrine Obligations of Broadcast Lincensees," 50 FR 35418 (1985).

76 Fowler and Brenner, pp. 243-4.